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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1906.

No. 49

THE STATE OF NEW JERSEY,
Appellant,
vs.
WILLIAM F. ANDERSON, Trustee of Cosmopolitan Power Company, Bankrupt,
Appellee.

REPLY BRIEF OF APPELLANT.

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I.

It is first contended that the claim of appellant is not a tax, and cannot be allowed any preference over the other creditors of the bankrupt. As introductory to their argument, counsel advance the suggestion that if the claim of appellant is given priority, almost the entire estate will be absorbed. No such fact appears in the record, and if it did it would be entitled to no weight. The estate has already paid a dividend and various sums have been expended for attorneys' fees. Whether the claim of appellant is entitled to

priority is a question of law which this court will decide irrespective of the condition of the estate. The fact must not be lost sight of that the present is as regards the appellant a test case, and that the decisions in numerous suits pending in other circuits await the outcome of the present appeal. This is conceded by appellee. (Brief, p. 9.)

The sections of the New Jersey Statute under which the taxes in question are assessed, are set out by appellee on pp. 11-17 of his brief. Counsel then say:

> "It will be noted that the language of the New Jersey statute is not so clear and unambiguous as to create a tax by its terms."

This contention is not borne out by a reading of the Act. As pointed out, on pp. 9-10 of our opening brief, the imposition is designated throughout the Act as a tax, and until the decision in the case of *In re Danville Rolling Mill Co.*, 121 Fed., 432 (a decision rendered without reference to *Hancock* v. *Singer*), no one disputed the fact that it was a tax.

It is next suggested by appellee that on account of the "peculiar provisions" of the Act it is apparent that the state itself does not consider the imposition as a "*real tax.*" The first "peculiarity" advanced is that the words "license fee" and "franchise tax" are used interchangeably. This is not so. The term "license fee" is not used anywhere in the Act except *in conjunction* with the term "franchise tax." The Act refers to the charge as the "*annual license fee* OR *franchise tax.*" In many places throughout the Act the term "license *fee*" is not used. Thus in section 2 it is provided that the charge ,"shall stand as

the basis of *taxation.*" Section 3 provides *inter alia* that the assessors shall report "the amount of *tax* due," and that if "the *tax* of any company remains unpaid * * * the same shall bear interest * * *" and also that the assessors shall have power to require information from any corporation "subject to *tax,*" etc.

Section 4 says:

> "Such *tax* * * * shall be a debt," etc., and "such *tax* shall also be a preferred debt in case of insolvency."

Section 5 says:

> "In addition to other remedies for the collection of such *tax,*" etc., the corporation may be restrained from exercising its franchise until the payment of "such *tax.*"

It is thus apparent that nowhere in the law are the terms "license fee" and "franchise tax" used interchangeably, although the term, "license fee or franchise tax," is used in connection with the term, "such tax." If it were in any way doubtful as to whether the imposition was a mere license, or a tax, the designation of the charge throughout the law *as a tax,* would indicate its true character.

The next "peculiar" provision suggested, is that the tax is based entirely upon the *amount* of capital stock issued and outstanding regardless of its value or the property of the corporation.

We perceive nothing peculiar in this method of assessment. In fact, assessments measured by the amount of the capital stock are the most common form of franchise taxes. This court in *Horn Silver Mining*

Co. v. *New York,* 143 U. S., 305, upheld the validity of such a tax, and there said:

> "According to the law of most states this franchise or privilege of being a corporation is deemed personal property, and is subject to separate taxation."

And quoting from its decision in *Delaware Railroad Tax,* 18 Wall., 206, 231, this court said:

> " 'the state may impose taxes upon the corporation as an entity existing under its laws, as well as upon the capital stock of the corporation or its separate corporate property. And the manner in which its value shall be assessed, and the rate of taxation, however arbitrary or capricious, are mere matters of legislative discretion;' except, we may add, as that discretion is controlled by the organic law of the state. And, as we there said also, 'it is not for us to suggest in any case that a more equitable mode of assessment or rate of taxation might be adopted than the one prescribed by the legislature of the state; our only concern is with the validity of the tax; all else lies beyond the domain of our jurisdiction.' "

And again:

> "It may impose as a condition of the grant, as well as, also, *of its continued exercise,* the payment of a specific sum to the state each year, or a portion of the profits or gross receipts of the corporation, and may prescribe such mode in which the sum shall be ascertained as may be deemed convenient and just. There is no constitutional inhibition against the legislature adopting any mode to arrive at the sum which it will exact as a condition of the creation of the corporation *or of its continued existence.* There can be, therefore, no possible objection to the validity of the tax prescribed by the statute of New York, *so far as it relates to its own corporations.*"

To the same effect, see *Vol.* 1, *Cooley on Taxation* (3rd ed.), pp. 153-4.

Stress is laid upon the fact that the tax in question is declared to be a debt, to collect which a suit may be instituted, the implication being that as the tax is declared to be a debt it ceases to be a tax. We answer this contention, pp. 21 *et seq, infra.* It is stated that no other remedies are given than such suit for the collection of the tax, except the forfeiture of the franchise. This is not so. Section 159 of the Act (set out at length on pp. 15-16 of appellee's brief) expressly provides that upon failure to pay the taxes for two consecutive years, the state may have a receiver appointed, and the court may enter a final decree for the payment of the taxes due, and issue execution therefor, which execution may be levied on any property in the state, including choses in action, patents, and licenses for patents.

After thus commenting upon the "peculiar" provisions of the Act, counsel conclude that the imposition is not regarded by the state as a *tax,* because it has not resorted to the "usual and ordinary" method of collection, viz., the creation of a lien upon property, or the seizure and sale of the property of the corporation. We have already pointed out that under Section 159 of the Act, the state has the power to obtain a decree and levy an execution, where the taxes are unpaid for two years. Again, provision is made for the collection of the tax by an action of debt, and upon the obtaining of a judgment the same may be collected by execution. But as shown in our opening brief (pp.

39-40) a tax is not a lien unless made so by statute. The failure of the legislature to make this particular tax a lien, or to provide for its collection by levy, does not change its nature as a tax. There are numerous methods adopted by the various legislatures to enforce the collection of taxes. The collection by an action at law is no more unusual than the collection by levy.

But the Bankruptcy Act does not grant priority merely to taxes that are liens.

In re Baker, 1 Am. Bank. Rep., 526, 529, it is said:

> "It is the opinion of the court *that even if the city had no statutory lien on the property of the bankrupt,* the claim for taxes has priority * * *."

In our opening brief (pp. 32-3) we referred to the definition adopted by this court in *Illinois Central Railroad* v. *Decatur,* 147 U. S., 190, 199, to the effect that

> "The word *'taxes'* means burdens, charges or impositions put or set upon persons or property for public uses."

Counsel for appellee characterize this definition as "highly untechnical" and say that the word "tax" has come, in a mistaken sense, to mean any charge exacted by the state, regardless of whether it is laid *in invitum,* or as the result of a bargain between the state and the citizen. It is contended that the present imposition is of the latter class, and that, therefore, it is not a tax. Upon this misconception the entire argument of appellee and the decision of the Court of Appeals rests.

In support of this contention, reference is made to *North Jersey City Ry. Co.* v. *Mayor of Jersey City*, 63 Atl., 833 (erroneously cited as 63 Atl., 83). That case, in fact, supports our position. There the question involved was as to the right of Jersey City to levy a *property* tax upon the right, privilege, license or franchise of the Street Railway Company to lay and maintain street railway tracks, and operate cars thereon. The Tax Act of 1903 provided for the taxation of all property not expressly exempted. All franchises and all property used for railroad purposes, etc., the *taxation* of which was provided for by any other law of the state, were exempted. The court said:

> "It is settled in this state that franchises are property (citing cases) * * *. The question, then, is whether the taxation of franchises is provided for by other legislation."

The Street Railway Company relied on the so-called "Voorhees Act" of 1900, which purported to tax the franchises of persons and corporations having the right to use or occupy the streets. It was contended by the city that the Voorhees Act was unconstitutional, but if constitutional that the percentage of gross receipts required to be assessed *was not a tax.* The objections to the validity of the act were (1) that a tax upon gross receipts is not a tax according to true value, as required by the Constitution, and (2) that the act attempts to provide two different methods of taxation for the property of the corporation, one by local assessors, according to its value, the other an arbitrary imposition by a state board. The court observed if the fran-

chise tax imposed is a *property* tax, that the first objection is fatal, and if not a property tax, the second objection is without force. The court said:

> "We think the tax on gross receipts is not a *property tax,* but a *license tax* imposed by the state as a condition precedent to the exercise of special privileges in the street * * * That the legislature did not intend the tax on gross receipts to be a property tax is indicated by the distinction made between property and franchises throughout the act."

The court then refers to the provisions of the act, and says:

> "We think it clear that the *franchise tax* was not intended to be a *property tax.* That impositions *of this character* (viz: franchise taxes) may be imposed by way of a license tax is well settled. *Such a tax* is imposed by this state upon the general franchise to be a corporation, and has been sustained by the courts. (Citing numerous cases.) The principle upon which such *taxes* are sustained is stated by Mr. Justice Field in *Home Ins. Co.* v. *New York,* 134 U. S., 594, and his language was approved by this court, in *Honduras Co.* v. *Board of Assessors* (54 N. J. L., 278), above cited."

The language of Mr. Justice Field referred to is as follows:

> "The granting of such right or privilege (of being a corporation) rests entirely in the discretion of the state, and, of course, when granted, may be accompanied with such conditions as its legislature may judge most befitting to its interests and policy. It may require, as a condition of the grant of the franchise, and also of its continued exercise, that the corporation pay a specific sum to the state each year or month, or a specific portion of its gross receipts, or of the profits of its business,

> or a sum to be ascertained in any convenient mode which it may prescribe. The validity *of the tax* can in no way be dependent upon the mode which the state may deem fit to adopt, in fixing the amount, for any year, which it will exact for the franchise. No constitutional objection lies in the way of a legislative body prescribing any mode of measurement to determine the amount it will charge for the privileges it bestows."

In that case the amount of a state tax was to be determined by the amount of capital stock and the annual dividends, and it was resisted on the ground that the capital was largely invested in United States bonds which could not be taxed by the state, but the tax was sustained on the principle above announced. The learned Justice further said:

> "*The tax* in the present case would not be affected if the nature of the property in which the whole capital stock is invested were changed and put into real property or bonds of New York or of other states. From the very nature of *the tax*, being laid upon a franchise given by the state, and revocable at pleasure, it cannot be affected in any way by the character of the property in which its capital stock is invested. The power of the state over the corporate franchise and the conditions upon which it shall be exercised, is as ample and plenary in the one case as in the other."

The New Jersey court continues thus:

> "The grant of the privilege to be a corporation rests in the discretion of the state, and may be made upon such terms as the legislature sees fit to impose. These terms are open to acceptance or rejection. In this respect the special franchise to use the streets does not differ essentially from the general franchise to be a corporation. It cannot be doubted that the legislature or a municipal

corporation vested with power to grant or refuse its consent to the special privilege to use the streets may grant the privilege on terms (citing cases). In such a case the imposition may be regarded as in the nature of rent or purchase price for the privilege; *but it may also be regarded as in the nature of a tax* subject to change by the legislature. In the *Lumberville Bridge Company* case the tax upon the franchise to be a corporation was imposed upon a corporation whose charter antedated the Act of 1846, making charters subject to alteration by the legislature. * * * *The tax* was sustained by this court. The same reasoning which justifies *the special tax* upon the corporate franchise justifies the special tax upon the special franchise to use the streets, although that special franchise may antedate the imposition of the tax."

The court concludes:

> *"It is, however, urged that if the franchise tax is the compensation exacted by the state for the exercise of the franchise,* IT IS NOT TAXATION *within the meaning of the exemption clause of the act of* 1903, *but rather in the nature of purchase price or rent. We think this contention also untenable. the exaction is called a franchise tax by the legislature, and the word taxation in the act of* 1903 *must be given the same meaning as the same word in the title of the act of* 1900. *Whether the use of the word by the legislature is strictly accurate is of no moment; the legislature had the right to call its exaction 'taxation.'"*

Then follows the language which counsel for appellee have set out on p. 20 of their brief, as follows:

> "As was said by the Court of Appeals of New York: 'Both in statutes and in judicial decisions the term "tax" is frequently used in a much more comprehensive sense than that which we have stated to be its accurate meaning. It is not used

> so broadly as to include the revenue from private property which the state or one of its political divisions may hold for emolument the same as other owners; but it certainly is used to comprehend exactions for the privilege of exercising franchise rights which latter are often, *especially in the case of foreign corporations*, merely the consideration received for privileges which the state is at liberty to grant or to withhold at pleasure.' *Heerwagen* v. *Cross-Town St. Ry. Co.*, 179 N. Y., 99, 71 N. E., 729."

This quotation was taken from the case of *Heerwagen* v. *Cross-Town Street Ry Co.*, 179 N. Y., 99, s. c. 71 N. E., 729. It is necessary to a proper understanding of the language quoted to refer briefly to the case from which it was taken. In that case an action was brought to recover the tax imposed upon a street railway company for its special franchise. The defendant claimed a deduction should be made on account of certain payments it had made to the municipality under an agreement to pay a certain percentage of its gross earnings. The tax act provided that there should be deducted from the amount of the franchise tax any sum paid to the municipality based upon a percentage of gross earnings, etc., which were *"in the nature of a tax."*

It was contended that the amounts paid to the city under the agreement in question were not "in the nature of a tax" and that no deduction should be made on account thereof.

The court said:

> "A tax has been defined as a forced contribution from a citizen to the state to be applied for governmental purposes. * * * The payments

> the defendants agreed to make were the consideration of the acquisition of valuable property rights which would survive its corporate existence and possess all the ordinary attributes of property. * * * The stipulated payments are really in the nature of rent or a rent charge. But granting all this, it seems to us manifest from the plain terms of the statute that these are the very payments which the legislature intended should be deducted from the amount of the special franchise tax."

Then follows the quotation set forth *supra*, p. 10.

The New York court therefore held that the payments in question were "in the nature of a tax" and that the company was entitled to credit therefor.

The court points out that many exactions are not taxes because they are not "forced contributions" levied by the state, but are more in the nature of rent which the state receives for the privilege of granting franchise rights. The court says that the word tax is so used *"especially in the case of foreign corporations."* We think we shall be able to show that the present franchise tax is not in the nature of rent for the privilege of corporate existence, and that that doctrine if applicable at all, applies only to *foreign corporations* seeking a license to do business in the state. There is a clear distinction between the payment of a *license fee* by a foreign corporation and the payment of a *franchise tax* by a domestic corporation. While in the former the imposition may or may not be a tax, in the latter it is always laid *in invitum*, and is necessarily a tax. But we shall later on recur to this subject more at length.

After quoting from the decision of the New York

court in *Heerwagen* v. *Cross Town Ry. Co., supra,* the New Jersey court concludes:

> "We think the franchises sought to be taxed by Jersey City are franchises, the *taxation* of which is provided for by another law, and that therefore they are not *taxable,* as property under the act of 1903. It was for the legislature to determine whether the tax imposed by the act of 1900 was a fair apportionment of the public burden without subjecting the prosecutors to a property tax upon the value of the franchise in addition. The *taxes* must be set aside."

The decision of the New Jersey court in the above case is a clear holding that the franchise tax *is a tax.* Otherwise the company would not have been entitled to exemption from the payment of property taxes under the general Tax Act of 1903.

Counsel for appellee also refer to the decision of this court in *People, ex rel. Metropolitan Street Railway Co.* v. *Tax Commissioners,* 199 U. S., 1, where the language of the New York court in *Heerwagen* v. *Cross-Town St. Ry. Co., supra,* is quoted. In that case and the succeeding case of *People, ex rel. Brooklyn City R. R. Co.* v. *Tax Commissioners,* 199 U. S., 48, the distinction between a franchise tax and the payment of the purchase price of a privilege or franchise, is clearly outlined. There it was contended that the provisions in certain grants or franchises, that the grantee shall pay something therefor, exempted the company from a tax on its franchises. This court held that the conditions upon which the franchises were granted were the purchase price of the grant, and that in the absence of an express

exemption the legislature was empowered to tax such franchises.

It was also claimed that the special franchise tax was void for the reason that it provided that certain annual payments made under existing contracts, should be deducted from the amount of tax levied, by reason of which deductions those who agreed to pay lump sums or annual sums less than the new tax for their franchises, were discriminated against.

The court answered this contention thus:

> "It may be observed that the lump sum is so obviously a payment for the franchise that it cannot be considered in any just sense as possessing the nature of a tax. It is not even rental. It is like money paid for a tract of land, part of the purchase price. It does not, like a percentage of the gross receipts, vary with the changes of business, has no resemblance to a continuing discharge of the obligation which property is under for contribution to the support of the Government."

In the present case the tax is paid as "a continuing discharge of the obligation which property is under for contribution to the support of the government." It is not paid as the consideration of the grant of the right to be a corporation. In fact the New Jersey statutes provide (Sec. 114, Dill's New Jersey Corporation Law, p. 138), that certain fees shall be paid by the corporators for the obtaining of a certificate of incorporation. The payment of these fees is the "consideration of the grant," and not the payment of the annual franchise tax.

Counsel for appellee say (p. 21), that a tax is a con-

tribution that is "demanded and required by the state, regardless of the consent of the citizen." They then add:

> "As the Circuit Court of Appeals said in its opinion,—'the State does not bargain with the subject, but commands,'—and in respect to a corporation the state does not *compel* a corporation to accept a charter, but in effect *bargains* with the incorporators to give them certain privileges or franchises, *in exchange for certain payments.*"

The complete answer to this contention is, as we have already pointed out, that the franchise tax is not the consideration of the grant to be a corporation. It is true that the state cannot compel a corporation to accept a charter and the incorporators in effect *bargain* with the state for the grant of a franchise, but the consideration of such grant is the fee paid in advance for the corporate privilege. The annual franchise tax cannot be the consideration, inasmuch as such tax must be paid by corporations organized previous to the passage of the act. Thus in *Lumberville Bridge Co.* v. *Assessors*, 55 N. J. L., 529, it is said:

> "The case of a corporation created by special act prior to 1884 * * * does not come under any different rule. The taxing act is general and the yearly fee provided by it falls as an incidental burden upon all miscellaneous corporations alike. * * *"

Again, as already shown in our opening brief, the legislature has the absolute power to increase or decrease the amount of the tax or abolish it entirely. The imposition therefore cannot be a contract between the corporators and the state for the reason that the liability is not fixed and determined

at the time the contract is made. But the courts of New Jersey have set this question at rest. Thus in *Lumberville Bridge Co.* v. *Assessors*, 55 N. J. L., 529, it is said that the tax in question is laid upon

"the right to exist in corporate form,"

and that

> "It is in short *a poll tax* levied upon domestic corporations for the right *to be.*"

And in *Pipe Line Co.* v. *Berry*, 52 N. J. L., 308, in discussing the question whether the tax law here under consideration was applicable to foreign corporations, the court said:

> "Mr. Justice Strong, in delivering the opinion of the court in *Railroad Company* v. *Georgia*, 98 U. S., 365, says: 'It is quite too narrow a definition of the word "franchise" to hold it as meaning the right to be a corporation. The word is generic covering *all* the rights granted by the legislature.'
>
> The act of 1884 requires all the enumerated corporations * * * to pay *an annual tax* for the use of the state by way of a license for their corporate franchises. The imposition *is not in compensation for the grant of the franchise by the state, but for the uses of the franchises in the state.*"

If therefore the tax "is not *in compensation for the grant* by the state, but for the uses of the franchises in the state" the contention that the franchise tax is a matter of bargain or contract between corporator and state, necessarily falls.

But irrespective of these considerations, there is a clear and well defined distinction between the imposition of a franchise tax upon a *domestic cor-*

poration, and the payment of a license fee by a *foreign corporation*, for the privilege of doing business in another state. This distinction while not always clearly defined, runs through the cases. It is clearly outlined in the recent decision of this court in *People of the State of New York* v. *State Board of Tax Commissioners*, 199 U. S., 1, *supra*, although in that case the point was only indirectly involved.

It is unnecessary, however, to review at length the numerous decisions of this court upon this subject. The cases of *Home Ins. Co.* v. *New York*, 134 U. S., 594, and the *Delaware Railroad Tax*, 18 Wall., 206, 231, fully illustrate the nature and character of the imposition levied by a state upon a *domestic corporation* in the form of a franchise tax. The character of the charge imposed by the state upon a *foreign corporation* in the form of a license fee, is discussed in the case of *Horn Silver Mining Co.* v. *New York*, 143 N. Y., 305. The distinction is also illustrated by the decision of this court in *Phila. Fire Ass'n* v. *New York*, 119 U. S., 110, where it is held that the state can discriminate between *foreign corporations* similarly situated.

Counsel for appellee in speaking of this franchise tax say (Brief, p. 23):

> "There is no difference between this form of exaction and the other form in such common use, whereby states cause *foreign* corporations to pay an annual license fee for the privilege of doing business in a different state, than the one of its creation. In such case the corporation may or may not avail itself of the *privilege*, but if it does, it contracts to pay certain stipulated amounts annually."

The same error, we submit, underlies the decision of the Court of Appeals. It says:

> "but the *tax* upon the estate is not to be confused with the *consideration* for the grant."

In his recent work on the "*Law of Foreign Corporations and Taxation of Corporations both Foreign and Domestic,*" Sec. 508, pp. 663 *et seq.*, Prof. Beale of Harvard says:

> "The *taxation* of the corporate franchise by the state which granted it can be restrained only by some provision of the state constitution * * *. The validity *of the tax* can in no way be dependent upon the mode which the state may deem fit to adopt in fixing the amount for any year which it will exact for the franchise. * * * It may well seek in this way to increase its revenue to the extent to which it has been cut off by exemption of other property from *taxation.* As its revenues to meet its expenses are lessened in one direction, it may look to any other property as sources of revenue which is not exempted from *taxation.*"

The author then quotes from the decision of this court in the *Delaware Railroad Tax,* 18 Wall., 206, 231, as follows:

> " 'The state may impose *taxes* upon the corporation as an entity existing under its laws, as well as upon the capital stock of the corporation, or its separate corporate property; and the manner in which its value shall be assessed, and the rate of *taxation,* however arbitrary or capricious, are mere matters of legislative discretion. It is not for us to suggest in any case that a more equitable mode of assessment or rate of *taxation* might be adopted than the one prescribed by the legislature of the state. Our only concern is with the validity *of the tax.* All else lies beyond the domain of our jurisdiction.' It is true, as said by this court in *California* v. *Railroad Co.,* that the

taxation of a corporate franchise has no limitation but the discretion of the taxing power; and its value is not measured like that of property, but may be fixed at any sum that the legislature may choose. It may be *arbitrarily* laid, without any valuation put upon the franchise. If any hardship or oppression is created by the amount exacted, the remedy must be sought by appeal to the legislature of the state. * * *"

The author continues:

"This *tax,* when imposed upon a *foreign* corporation, is a privilege tax; *such as will be considered in the next section* (Sec. 509); when imposed upon a *domestic* corporation, it is in the nature of a *poll tax,* and in imposing a poll tax, the state which has jurisdiction of the person cannot be controlled." * * *

In *Lumberville Bridge Co.* v. *Assessors,* 55 N. J. L., 529, the present franchise tax is characterized as

"a *poll* tax, levied upon domestic corporations for the right to be."

The author continues:

"This tax is not a property tax, even when it is measured by the amount of property of a corporation. Therefore, to levy such a tax in addition to a property tax is not double taxation; and the tax is not subject to a constitutional requirement that taxes shall be uniform. * * *"

And in "the next section" (Sec. 509) the author says:

"A state may as has been seen tax any privilege it grants. Such a tax, *or rather license fee,* is the payment exacted of a *foreign corporation* for the privilege of doing business within the state. Since a foreign corporation may be allowed to do business in a state upon conditions, the payment of a sum of money may be made a condition; and

> this may in form be the payment of a tax greater than or different from that paid by a domestic corporation. Such a tax is valid. *It is not properly an exercise of the power to tax property, but is a license fee paid for the privilege of entering the state, and its validity* is a necessary deduction from the right absolutely to exclude the foreign corporation. Upon a similar principle the exaction of a fee for filing a certificate of incorporation is not a tax; nor is a fee for filing an annual report. * * *"

And in a subsequent section, in speaking of the right of a state to tax the franchise of a *foreign* corporation, Prof. Beale says:

> "Sec. 755. TAXATION OF FRANCHISE AS PROPERTY. But while permission to do the business of interstate commerce may not be taxed, the franchise of the corporation, regarded as property, may be taxed so far as it can be said to enter into the value of the property within the state, even if the corporation is engaged in interstate commerce, provided only it is not a franchise conferred by the United States. The distinction between a tax upon the *franchise* and a *license fee* to do business is certainly a shadowy one; but once the principle already considered* is established, that a foreign corporation may be taxed in a state, as upon its property actually there, upon its business capital, including franchise and good will, it follows that such a tax assessed upon the *franchise of a foreign corporation* engaged in interstate commerce is valid as a mere tax on property within the jurisdiction."

As observed by the distinguished author, the distinction between a license fee and a franchise tax *in the case of a foreign corporation is,* at best "a shadowy one," but aside from the present contro-

Supra, Sec. 507.

versy, we know of no decision (other than that of District Judge McPherson in the Danville Rolling Mill Co. case, 121 Fed., 432) where an annual franchise tax levied upon a *domestic* corporation has been held to be other than a tax. As we have before said and repeat now, a franchise tax lacks every element of a contract obligation; it applies to corporations organized before the passage of the taxing act; it is not a subject-matter of bargain between the state and the corporation; it is not the *consideration* of the grant as are other exactions paid before the issuance of the charter, and it is laid *in invitum*, and for the purpose of raising revenue. These and other considerations not necessary to be repeated, completely demonstrate the exaction to be *a tax*, and not the purchase price of corporate existence, as contended by appellee.

It is next urged that the charge is not a tax because it is declared by the Act to be a *debt*, and that as the state is placed on an equal plane with other general creditors, no tax can be created in the nature of things.

To paraphrase the argument:

> "A tax is not a debt, therefore a *tax* which is declared to be a debt is not a tax."

The two premises are clearly inconsistent, as the first assumes that the tax is not a debt, and the second states that when a *tax is a debt*, it is not a tax. If a tax cannot be a debt, the second premise which states that a tax *is* a debt, proves the first to be false. While, as a general rule, it is true that a tax is not a debt, in the sense that a debt is the creation of contract, the rule is not applicable where, as in the present case, the tax is expressly declared to be a debt by

statute. The statute takes the tax out of the general rule that a tax is not a debt, as that rule only applies in the absence of a statute.

The New Jersey Act provides (Sec. 153)

> "Such *tax*, when determined, shall be a debt from such company to the state, for which an action at law may be maintained * * *."

It will be noticed that the tax in question is only made a debt *for the purpose of collection,* and not otherwise.

The fallacy of their position is clearly shown by the case of *Meriwether* v. *Garrett*, 102 U. S., 472, cited by counsel in support of their argument to the effect that a tax is not a debt. But in citing this case, counsel fail to refer to the fact that in that very case, it was held that where a tax is declared to be a debt, for the purpose of collection, as in the present case, its character as a tax is not thereby changed. It is there said (pp. 513-14):

> "Taxes are not debts. It was so held by this court in the case of *Oregon* v. *Lane County*, reported in 7th Wallace. Debts are obligations for the payment of money founded upon contract, express or implied. Taxes are imposts levied for the support of the government, or for some special purpose authorized by it. The consent of the taxpayer is not necessary to their enforcement. They operate *in invitum. Nor is their nature affected by the fact that in some states—and we believe in Tennessee—an action of debt may be instituted for their recovery. The form of procedure cannot change their character.*"

And see Vol. 9 Rose's Notes, p. 1106, and cases cited. To the same effect, see *Danforth* v. *McCook County* (S. D.), 26 N. W., 940. And in the present case the

section of the New Jersey statute, above quoted, which declares the tax to be a debt, etc., we repeat refers solely to procedure. It provides that

> "* shall be a debt * * * *for which* an action at law may be maintained * * *."

The decisions above cited show conclusively that this section does not in any way affect the character of the tax as such. It is still a tax no matter by what name it is called, nor what it is declared to be. There is no reason why a tax should not be declared to be a debt for the purpose of collection, *or even generally*, and yet retain the characteristics of a tax. The cases cited by counsel are cases where no statute existed declaring the tax to be a debt. Of course, a tax is not a debt in its strictest sense, as a debt is usually founded on contract. But a tax is a debt in the sense that it is an obligation due the state.

On pages 24-25 of their brief appellee quotes at length from the case of *American Smelting & Refining Co.* v. *People*, 82 Pac., 531 (Colo. 1905). That case merely holds that the fee paid in advance by a *foreign* corporation for the privilege of doing business in a state is not a tax, but as the court there observed, it was "the purchase price or bonus" for the privilege of doing business in the foreign state. But the court also held that the *annual franchise tax* similar to the New Jersey tax, *is a tax*, saying (p. 533):

> "The contention that section 65 is invalid, because the thing imposed is in the nature of a license under the police power, *and not a tax* under the sovereign power of taxation, and therefore not within the title of the Act, which is 'An Act in relation to public revenue,' cannot be upheld.

> That which is levied here is not for regulation, nor is it traceable to the police power of the state, but finds its sanction *in the taxing power*, and, while called a 'state license tax,' it is, as already decided, a *business tax*, laid for the purpose of procuring revenue for state purposes, and therefore the provision is clearly within the title."

And throughout the case the annual charge is referred to as a tax. In fact, the only difficulty the court seemed to have had in classifying the nature of the charge, was whether it was a franchise, excise or business tax, or a property tax.

It is next urged that the fact that the imposition is called a tax in the Act, and in the decisions thereunder, does not determine its character. We do not contend that the designation of the charge as a tax absolutely determines its character. But we believe where the charge possesses the essential elements of a tax, that its designation as such by the legislature is very persuasive.

Thus, in the recent work of Gray on Limitations of Taxing Power, p. 42, it is stated:

> "The statutory designation, while not absolutely controlling, is generally an important element in determining what kind of tax the statute imposes."

Counsel for appellee then state that the decisions of the courts of New Jersey, cited in our opening brief, pp. 11-17, do not decide that the franchise tax in question is a tax. Those cases are referred to at length in our opening brief, and, as they speak for themselves, it is unnecessary to again review them here. Many of them are cited for the purpose of showing that the courts of New Jersey have, at all

times, designated the franchise tax, as a tax, whenever the question has come before them.

Reliance is also placed on the decision of District Judge McPherson *In re Danville Rolling Mill Co.*, 121 Fed., 432, where the present franchise tax was held not to be a tax within the meaning of the Bankruptcy Law. That decision is based solely on the Car Company decision, and if that furnishes no support, the case as an authority fails. Irrespective of the decision of the lower courts in the case at bar the Danville Rolling Mill case is the only one in the books which denies priority under the Bankruptcy law to the present tax. Claims for franchise taxes have been presented by the State of New Jersey in numerous cases, but until the decision in the Rolling Mill case, the right to priority was never questioned. In fact, after the decision in that case, the State of New Jersey prayed an appeal to the United States Circuit Court of Appeals, but this was rendered futile by reason of the fact that the trustee in bankruptcy with the permission of the court paid the franchise taxes in full.

Reliance is also placed on *In Re Ott*, 2 Am. Bank. Rep., 637. In that case it was held that a mulct tax levied by the State of Iowa for the privilege of selling liquors, was not entitled to preference as a tax, because the Supreme Court of Iowa had theretofore held that such mulct tax was *not a tax*. If the Supreme Court of New Jersey had held that the present franchise tax was not a tax there might possibly be a different question here.

Appellee places special reliance upon the Ott case, however, for the reason that the mulct tax was given

the same lien as other state taxes. By turning to the report of the case (p. 638) it will be found that *the bankrupt did not own the premises upon which the tax was a lien,* but that they were owned by one Gradient.

Counsel ineffectually attempt to distinguish the Singer case by the statement that the question as to whether the franchise tax was a tax was not before the court. We refer to this case at length in our opening brief on pp. 15 *et seq.* A reading of the case will readily show that the question was squarely presented and as squarely decided. The case is on "all fours" with the one at bar, and we are content to rest the present case upon that decision. It is contended, however, that it was unnecessary to pass upon the question whether the charge was a tax, inasmuch as the decision of the court in the second Singer case (62 N. J. L. 289) was placed upon the ground that the court's former adjudication in the first Singer case (58 N. J. L., 634) was binding on it. An examination of the Singer case will readily demonstrate that the decision was placed upon both grounds. The fact that the decision might have safely been placed upon one of such grounds does not render the language of the court upon the other point *obiter dictum.* Counsel say that the Singer case when carefully considered and analyzed, furnishes but small comfort to appellant, especially when read in the light of the separate opinion of Judge Vredenburg, holding that the imposition was "*in a manner a tax.*"

This innuendo is for the purpose doubtless of creating the impression that Judge Vredenburg did

not concur in the holding of the majority that the imposition was a tax. Upon turning to the opinion of that judge it appears that no such language was used, though in the brief of counsel the language is quoted and italicized. The court itself did say, however, that:

> "The exaction annually of this license fee * * * though not in form a tax upon the property * * * is in fact a burden upon the annual earnings of that property * * * and thus falling on them, is in a manner * * * a tax *upon that property.*"

Counsel for appellee on pp. 41-43 of their brief have quoted (with apparent approval) from the briefs filed on behalf of the State of New Jersey in the Singer case, in which it was argued by the state that license fees were not included in the term "tax." The complete answer to this suggestion is that the highest court of New Jersey did not agree with the then contention of the taxing authorities of the state, but squarely held that the imposition was a tax, and therefore within the exemption clause of the Singer Company's charter. We do not understand that appellee contends that the State of New Jersey is now estopped from relying on the decision of her highest court that the charge in question is a tax, because of the fact that the state originally contended that it was a mere license fee. The fact that the state did so contend, *and that the contention was not sustained,* disproves the assertion of appellee that the question here involved was not decided in the Singer case.

The Car Company case is sufficiently referred to on pages 19 *et seq.* of our opening brief.

In this connection it may be noted that the scope of

the Car Company decision is evidenced by the later decision in *King* v. *American Elec. Veh. Co.* (N. J., Dec. 12, 1905), 62 Atl. Rep., 381. There it was contended inasmuch as the corporation was insolvent and all of the property of the corporation had been turned into cash by the receiver, that it should not pay a franchise tax *thereafter* assessed. The court overruled this contention and said:

> "It has been determined by our Court of Errors and Appeals that the assessment to be made against the franchise of a company incorporated under the laws of this state is an arbitrary imposition laid without regard to the value of its property, or its franchises, or whether it exercises the latter or not, and is imposed solely as a condition of its continued existence, and that without regard to solvency or insolvency. *In re U. S. Car Co.*, 60 N. J. Eq., 514, 43 Atl., 673."

In our opening brief (pp. 27-8), we cited *Myers* v. *Campbell*, 64 N. J. L., 186, where the Singer case is cited approvingly. Counsel say that this is "a totally misleading statement as the Singer case was cited on a different point." The only purpose of the citation as we *then* stated in our opening brief was to show "That the Car Co. case is not regarded as departing from the Singer Co. case." In the Singer case the court squarely holds that the franchise tax is a tax. Appellee claims that in the Car Company case decided eight months later than the Singer case, which decision was concurred in by the same justices who decided the Singer case, the court decided that the impositon was not a tax. In the Car Company case the Singer case is not referred to. If the Car Company case holds, as counsel for appellee claim, it can only be upon

the theory that the Singer case is overruled upon this particular point. The fact, therefore, that the Singer case is referred to in the case of *Myers* v. *Campbell, supra, subsequent* to the Car Company decision, demonstrates that the doctrine of the Singer case is still unchanged and unmodified.

The case of *New Jersey Street Ry. Co.* v. *Mayor of Jersey City*, 63 Atl., 833 (erroneously cited 63 Atl., 83), relied on by appellee (their brief, p. 47) as holding that the imposition is not a tax, is distinguished on pages 7, *et seq., supra*. The case does not so hold. In fact, as already pointed out, it holds that the charge is a tax. The court said (p. 834):

> "The grant of the privilege to be a corporation rests in the discretion of the state, and may be made upon such terms as the legislature sees fit to impose. Those terms are open to acceptance or rejection. In this respect, the special franchise to use the streets does not differ essentially from the general franchise to be a corporation."

From this language counsel for appellee draw the conclusion that the franchise tax is a contract obligation, and not a tax. They say:

> "The offer and acceptance, with the payment of a consideration, are the indicia of contract, not of tax."

The court did not announce any such doctrine. An examination of the case discloses that at the conclusion of the opinion the court holds that the franchise tax is a tax thus:

> *"It is, however, urged that if the franchise tax is the compensation exacted by the state for the exercise of the franchise, it is not taxation within the meaning of the exemption clause of the act of* 1903, *but rather in the nature of purchase price or*

> *rent. We think this contention also untenable. The exaction is called a franchise tax by the legislature, and the word taxation in the act of* 1903 *must be given the same meaning as the same word in the title of the act of* 1900."

Counsel for appellee then say (their brief, p. 49) that the payment of a franchise tax is the consideration for the grant of a charter, and that in some states this consideration is payable in a lump sum, while in New Jersey it is payable in annual installments. We have already pointed out (*supra*, p. 14) that the incorporators of a New Jersey Company are obliged to pay a lump sum in advance for the issuance of a charter. The annual license fee cannot therefore be considered as the purchase price of the grant, inasmuch as that consideration is payable in advance before the issuance of the charter. This view is confirmed by the fact that the franchise tax law is applicable to corporations organized before the passage of the law.

Counsel conclude their argument upon this point with the contention that the Federal Courts are not bound to follow the decisions of the courts of New Jersey as to what constitutes a tax. They say:

> "Even if the legislature of the state had declared the charge to be a tax, and the courts of the state in construing it had agreed therein mistakenly, the United States bankruptcy courts would not be obliged to follow such error."

In our opening brief (pp. 29-30) we answered this contention.

In addition to the cases there cited, the following additional authorities may be noted:

In re Stalker, 123 Fed., 961 (Dist. Ct. W. D. New York), the court in allowing priority to a special assessment said:

"The point that the word 'tax,' as used in the section under consideration, does not include assessments levied for local improvements, is not maintainable. It is perfectly true that well-recognized distinctions exist between the word 'tax' and 'assessment.' * * * This question is broad, and might be of much difficulty, were it not that the interpretation adopted by the highest tribunal of the state must govern here. It is an established rule in the courts of the United States that the decisions of the state courts with regard to the law of real estate, construction of state constitutions and statutes, are authoritative rules of what the law is."

Citing *Burgess* v. *Seligman*, 107 U. S., 33, and other cases.

In *First National Bank* v. *Aultman, Miller & Co.*, 12 Am. Bank Rep., 12, it is said:

"In determining what is a tax in the respective states, the bankruptcy courts look to the laws and decisions of such states. When either the statute law or the decisions of the courts of the state say that a certain charge or imposition is a tax, the bankruptcy court will require the trustee to pay the same when it is legally due and owing by the bankrupt."

In matter of Mutual Mercantile Agency, 8 Am. Bank. Rep., 435, it is said:

"Following the principle of the *Ott case*, that the construction given by the state court to the state exemption laws should be followed by the Federal courts, we must consult the law, not of Iowa, but of the state of New Jersey, in deciding the case under consideration."

See also:

In re Danville Rolling Mill Co., 121 Fed., 432, S. C., 10 Am. Bank. Rep., 327.

In re Camp, 1 Am. Bank. Rep., 165.

This decision was affirmed by Judge Wing on January 9, 1905.

And in matter of *Emmerman* v. *Ohio Steel & Iron Specialty Co.* (U. S. Dist. Ct., N. Dist. of Ohio), 13 Am. Bank. Rep., 39, the referee said:

> "The Bankruptcy Act does not make any distinction as to the character of the tax which is imposed."

This decision was also affirmed by Judge Wing on January 9, 1905.

And in Brandenburg on Bankruptcy (3rd Ed.), p. 646, it is said:

> "A license fee or franchise tax has been held to be entitled to priority of payment." (Citing cases.)

But even if we assume that the Car Company case decides all that appellee claims for it, and that no part of its language is *dictum*, yet that case does not decide that the charge *is not a tax.* The language of the case is that it *"is not a tax upon corporate franchises,"* and that "in fact, it is not, *strictly speaking,* a tax at all."

As already shown, the statement of the court that it was not "strictly speaking" a tax, was made in the light of the prior decisions (*Standard Cable Co.* v. *Attorney General,* 46 N. J. E., 270, *Hancock* v. *Singer Mfg. Co.,* 62 N. J. L., 289) to the effect that it was not a *property* tax, and therefore not within the scope of Article 4, Section 7, paragraph 12 of the New Jersey Constitution, which provides

> "that *property* shall be assessed for taxes under general laws, and by uniform rules, according to its true value."

But, assuming further, for the purpose of this argu-

ment, that the court did hold that it is not *strictly speaking* a tax, it is still a tax in the sense in which that word is used in Sec. 64a. In other words, that section is not limited to "strict" taxes, but it applies to *all* taxes by whatever name they are called. And in this sense it would also include license fees or taxes which are paid *in advance,* either by a domestic corporation, for the privilege of existence, or by a foreign corporation for the privilege of doing business. In fact, throughout the opinions of this court, wherever reference is made to the subject, the license fee paid by a foreign corporation is described as *a tax upon the privilege of doing business.* We submit that whether this court takes the view that the charge is a franchise tax or an impost as held in the Singer case, or an "arbitrary imposition" within the meaning of the Car Company case or a "poll tax" as held in *Lumberville Bridge Co.* v. *Assessors,* 55 N. J. L., 529, is wholly immaterial, as in any event the charge is entitled to priority under the express terms of Sec. 64a, and we urge that even if the court should find itself unable to reconcile the Singer and Car Company cases, that reference should be made to the earlier and later New Jersey decisions wherein the charge is denominated as a tax, as in *Lumberville Bridge Co.* v. *Assessors, supra,* where the court describes the charge as

> "*A poll tax,* levied upon *domestic* corporations for the right to be."

II.

THE AMOUNT OF THE 1902 TAX.

It is sought to justify the action of the referee in reducing the amount of the 1902 tax upon the ground (1st) that the Bankruptcy Act (Sec. 64a) permits the court to determine the amount and legality of the tax and (2nd) that inasmuch as the liability arises out of contract the courts are authorized to look to the contract as the measure of liability. We have discussed this subject at length on pp. 40-43 of our opening brief, and it is necessary to add but little here. We believe that it is clear upon both principle and authority, that the action of the assessors is not subject to collateral attack, and that this rule is not changed by the provisions of Section 64a. It is probably true if the bankrupt had complied with the law and made a report as to its outstanding capital stock, that the assessment would have been but $4,250. But in the absence of such a report, the assessors, in compliance with the law, made the assessment from the best information obtainable. In such a case the assessment is conclusive, unless assailed in a *direct* proceeding. That course was open to appellee, but he neglected to avail himself of it.

The question is squarely decided in the recent case of *King* v. *American Electric Vehicle Co.*, 62 Atl., 381, decided Dec. 12, 1905. There the defendant company was organized in New Jersey as a manufacturing company. At least 50 per cent. of its stock was invested in manufacturing within the state and its capital stock

was therefore exempt. From 1899 to 1902 it made a proper return to the assessors, and no tax was assessed. In September, 1902, the company was adjudged insolvent and a receiver was appointed. In 1903 the assessors, in the absence of a return, made an assessment on the stock of the corporation, and the state made a demand on the receiver therefor. As in the case at bar, no appeal was taken by the receiver or the corporation. The claim was made there as here, that the assets were insufficient to pay the creditors, and that the claim for taxes should therefore be disallowed, etc.

The court said:

> "The claim which the receiver now makes on behalf of the creditors of this insolvent corporation is that, as it was a manufacturing corporation, the assessment would not have been made if a proper return of the character of the business of the corporation, and the fact of its insolvency, had been made to the state board; that the policy of the lawmaking power of the state is in favor of fostering manufacturing companies; and that the omission to make the return, upon which the state board allows the exemption, should not be permitted to overthrow this beneficent policy. With a desire to give effect to this liberal intention, I have sought for some logical reason upon which to rest a conclusion favorable to the claim of the petitioner, but have not been able to do so."

The court then sets out the provisions of the law and continues:

> "It has been determined by our Court of Errors and Appeals that the assessment to be made against the franchise of a company incorporated under the laws of this state is an arbitrary imposition laid without regard to the value of its property, or its franchises, or whether it exercises the latter or not, and is imposed solely as a condition

of its continued existence, and that without regard to solvency or insolvency. *In re U. S. Car Co.*, 60 N. J. Eq., 514, 43 Atl., 673. The defendant company had a corporate existence in 1903, it made no return and took no steps to put itself in a position to have the benefit of the proviso contained in the act of 1901, and, so far as the state board of assessors had knowledge, it fell within the class described in the act as 'all corporations incorporated under the laws of this state.' "

And the court concluded:

"As in the U. S. Car Company case, *supra*, it was held that neither the levying of the assessment after the appointment of the receiver, nor the fact of insolvency, in any way affected the right of the state to the franchise tax so long as the company continued in existence, and as it has also been determined in *Hardin* v. *Morgan et al., supra*, that the making of the return is a pre-requisite to exemption, I am of the opinion that the cases last cited must control the one under consideration, and that, as this corporation was subject to a franchise tax or license fee unless it made the return required by law, the assessment was properly levied, and the receiver will be so advised."

The cases cited by counsel for appellee on pp. 56-57 of their brief to the effect that the assessment can only be levied on stock actually issued and outstanding, are all cases where the assessment was attacked in a direct *proceeding by certiorari.*

III.

THE ASSESSMENT FOR 1902 WAS NOT VOID.

It is contended that the claim for 1902 should be denied priority for the reason that the assessors did not make a report of the assessment on or before the first Monday in June, as prescribed by the statute. This contention was advanced in the briefs filed in the Court of Appeals. The court there said:

> "Whether, as appellee urges, the court erred in allowing any sum whatever for 1902, cannot be reviewed, *as no cross appeal was taken.*"

Counsel do not now dispute this proposition, but say that if the claim should not have originally been allowed, it should not now be given priority, even though the appellee is not now in a position to complain of such allowance. It would seem that the mere statement of such a proposition furnishes its answer.

But irrespective of this consideration, a reading of the law demonstrates that the levying of the tax is not conditioned upon the making of the report. The act (Sec. 150) provides that the corporation *shall pay* an annual license fee. Section 152 provides that the assessors shall certify to the comptroller on or before the first Monday in June a statement *of the basis* of the franchise tax, which shall thereupon become due and payable, etc. The making of this report does not in any way affect the validity of the tax. It merely fixes the time when the assessment is to become due and payable. Again, it is well settled that the time in which an assessment is made is merely directory, and if an assessment is made at a later date, its validity is in

no way affected, unless the right of third parties intervene.

Wheeler v. *City,* 24 Ill., 105.
Easton v. *Savery,* 44 Iowa, 654.
Pond v. *Negus,* 3 Mass., 230.
Desty on Taxation, p. 519.

Thus in Vol. 1 Cooley on Taxation (3rd ed.), p. 487, it is said:

> "So in general the fixing of an exact time for the doing of an act is only directory where it is not fixed for the purpose of giving him a hearing, or for any other purpose important to him."

And in the present law the making of the report on or before the first Monday in June is merely directory. It was never the intention of the legislature to place it in the power of the Board of Assessors, who are charged with the performance of merely ministerial duties, to nullify the tax laws of the state by a failure to make a report within the time fixed. After the expiration of such time the assessors could be compelled by mandamus to make the report.

Counsel for appellee cite the case of *Beard* v. *Board of Supervisors,* 51 Miss., 542, as holding a *contra* doctrine. The case is not in point. There the board was mandamused to levy a tax for school purposes. The board made a return that they could not levy the tax for the reason that they had not received the report from the county superintendent, as to the needs and requirements of the schools. The court said:

> "The report and estimates of the superintendent are necessary data to fix the *rate* of assessment. If, therefore, the board were not advised, in the mode prescribed, of a deficit, and its amount,

they could not be chargeable with the neglect of duty complained of."

The court did hold, also, that the legislature intended that the taxes should be imposed at the July session. The reason of this was that the board was limited to a total tax of $25 on every $1,000 *for all purposes.* The court observed:

> "The law does not mean that the board shall, in its discretion, make a levy of taxes for one purpose at one session, and for another at another session, but the injunction is plain that the especial business at the July session shall be to consider the subject of county finances—the demands upon the taxing power, *so to adjust the rate of taxation* within the limits fixed by law, as that all legitimate objects shall be provided for. The act of 1873 contemplates no departure from this general rule, for the latest day allowed the county superintendent to make his estimate for school purposes is the first day of July, so that all that is necessary to be known by the board, in reference to the needs of the public schools, must be before it at the session in July, or if that fails, then at the called session provided for in section 1373."

Reference is also made to *Wiley* v. *Flournoy*, 30 Ark., 609. That case merely held that the clerk and county judge who with the assessor constituted the County Board of Equalization, had no authority under the revenue law to change the valuation of land, as returned by the assessor, after the adjournment of the Board of Equalization. There the act expressly limited the session of the board to six days, and the change in the assessment was made after adjournment, in private, at the residence of the county judge, and by only two members of the board.

The next case cited is *Mix* v. *People,* 72 Ill., 241. In

that case it was held that the statutory provision which required the various local authorities to certify to the county clerk the several amounts which they required to be raised by taxation, was mandatory. The court held that if such report could be filed at any time, the local officers would

> "have it in their power to hinder, delay and obstruct the collection of the entire revenue, by their negligence or incompetency."

And the court said:

> "Such a power to obstruct the collection of all taxes, in the municipality making such a levy, cannot exist, nor was it intended that it should."

A number of other reasons are set forth in the opinion, showing that the provision there in question was mandatory, but it is unnecessary to further refer to them.

Reference is also made to *Cogill* v. *Lang*, 50 Ill., 202. We presume counsel refer to *Cowgill* v. *Long*, 15 Ill., 202. This case is to the same effect as that of *Mix* v. *People, supra.*

Counsel say if the assessors *can* make their report at any time after July 1st, that the corporation will be deprived of the right of appeal provided for by Section 162. That section provides, however, that such appeal may be taken "within three months *from the date of assessment.*" If the assessment is not made until November, the time for appeal will not commence until November. The requirement that interest must be paid must receive the same construction. The interest is not payable until the tax is due. The Act (Sec. 152) provides for the making

of a report by the assessors of the amount of the tax and that such tax shall "*thereupon*" become due and payable. The Act also provides that

> "If the tax * * * remains unpaid on the first day of July, *after the same becomes due*," it shall bear interest, etc. It is clear that if the tax is not assessed it is not due, and if it is not due, it bears no interest.

But in any event the corporation cannot attack the validity of the tax in this collateral proceeding. (Opening brief, pp. 42-3.)

IV.

THE LICENSE FEE IS A TAX WITHIN THE MEANING OF SECTION 64A.

Under this head it is argued that under section 64a only the taxes of a *certain or particular state* are entitled to priority, and not the taxes of all the states.

Section 64a provides:

> "The court shall order the trustee to pay *all* taxes legally due and owing by the bankrupt to the United States, state, county, district or municipality," etc.

It is argued that the grammatical construction of this section requires the insertion of the word "the" before the words "State," "county," etc., and that only taxes due to "the state," to "the county," etc., are entitled to priority. The same contention was unsuccessfully made in the Court of Appeals. In that court the difficulty presented itself to appellee as to what "certain or particular state" Congress intended

to favor. Counsel thus solved the problem, to use their own language.

> "*The only reasonable conclusion* from the language of this section seems to be *the state in which the bankrupt has property from which the taxes can be collected.*"

Counsel now say (their brief, pp. 63-64):

> "If the question were asked *which* state, *which* county, or *which* district is meant, the FIRST AND MOST APPARENT ANSWER WOULD BE, *the state in which the bankruptcy proceedings are pending.*"

And yet on page 68 of their brief counsel say:

> "Had Congress intended to favor only the state in which the proceedings were pending it would have used the language of the Act of 1867."

Counsel abandon "*the only reasonable conclusion*" and adopt "*the first and most apparent*" one.

The reason counsel now assign for favoring the state where the proceedings are pending is that

> "it is there that the bankrupt usually has the bulk of his property—and it is there that the enforcement of the tax claim could be most easily made by law, seizure and sale of the property of the bankrupt."

Suppose the bankrupt has property in more than one state. What reason is there for giving priority to a single state, or why should preference be given to the taxes levied on the "bulk" of the bankrupt's property, and not on all of it, wherever it is situated: Suppose the bulk of the property is not in the state where the bankruptcy proceedings are pending?

Reference is made by way of comparison to the Bankruptcy Act of 1867. That act expressly provided (Clause 3):

> "All debts due to the state *in which the proceedings in bankruptcy are pending*, and all taxes and assessments made under the laws of such state"

shall be entitled to priority.

Clause 5 provided that:

> "Nothing contained in this act shall interfere with the assessment and collection of taxes by * * * *any state.*"

Counsel then cite *In re Ambler*, Fed Cas. 271; s. c. 8, Ben. 176, a decision under the Act of 1867.

The court there said:

> "But the only priority and preference in the distribution of the assets of the estate in bankruptcy of the bankrupt, given by the section in question of the statute, to taxes due to a state, is the priority and preference given by the *third* subdivision of the section, to taxes and assessments made under the laws of the state *in which the proceedings in bankruptcy are pending.*"

We fail to see the pertinency of the citation. But counsel say (their brief, p. 65):

> "* * * that Congress intended to grant the right of priority to such states only who (*sic*), independently of bankruptcy proceedings, *could have actually collected the tax in question from property situated within the boundaries of such state.*"

This is a change of front from the position taken by counsel in their brief (pp. 63-4), where they contend that it was the intention of Congress to allow tax priority *only to the state in which the bankruptcy proceedings are pending.* The contention now made can only mean that Section 64a of the Bankruptcy Act of 1898 applies only to *property* taxes. There is nothing in the

law upon which any such claim can rest nor is there any authority in support of it.

In the matter of the Mutual Mercantile Agency, 8 Am. Bank. Rep., pp. 435, 437, it is said:

> "There is nothing in the Bankruptcy Act to suggest an intention of Congress in the use of the word 'tax' to limit the meaning to any particular kind of tax."

The contention is also answered by the recent case of *City of Waco* v. *Bryan,* 127 Fed., 79 (C. C. A., 5th Cir.), There the City of Waco made proof of a debt for taxes due to it, and asked for priority of payment. The referee and the District Court denied the claim on the ground that the property upon which the taxes were assessed did not come into the hands of the trustee. The Court of Appeals reversed the judgment and said:

> "It is not disputed by anything we find in the transcript that the said taxes are legally due and owing by the bankrupt to the City of Waco, *irrespective of any lien for taxes on the property assessed.* * * *"
>
> "*This section* (64a) *is perfectly plain,* and seems to admit of very little, if any, construction. It is contended that it is inequitable for the bankrupt's estate to be compelled to pay by priority taxes originally levied on property which does not come into the hands of the trustee. To this it is sufficient answer to say that the priority to be given payment of claims against the bankrupt *is within the control of the lawmaker, and is absolutely fixed by the statute, and the rule therein declared cannot be varied to meet ideas of what equity and good conscience may require.*"

The court refers to the provisions of the prior Bankruptcy Acts and continues:

"The present bankruptcy law gives priority for *all* taxes legally due and owing by the bankrupt to the United States, the state, county, district, or municipality, in advance of the payment of dividends to creditors. In short, it puts taxes due the state, counties, and municipalities upon the same footing as taxes due the United States. On the plain construction of Section 64a of the present law, and particularly in the light of past legislation on the subject, there is no room to hold that it makes any difference whatever, as to the right of priority, whether property on which taxes were assessed ever came into the hands of the trustee. The test is given in the statute: Are the taxes legally due and owing by the bankrupt to the United States, state, county, district or municipality claiming the same? If yea, they are entitled to be paid in advance of the payment of dividends to creditors, for thus saith the law."

Judge Shelby dissented, but upon a different ground.

In *City of Chattanooga* v. *Hill,* 139 Fed., 600 (C. C. A. 6th Cir.), the State of Tennessee, the County of Hamilton, and the City of Chattanooga sought an order to require the trustee to pay certain taxes assessed against the real and personal property of the bankrupt. Eighty-five per cent. of the property being heavily mortgaged was surrendered to the mortgage creditors. The unmortgaged property that came into the hands of the trustee represented but 15 per cent. of the property upon which the tax was assessed, and the court ordered the trustee to pay but 15 per cent. of the taxes. The Court of Appeals in reversing this judgment, said:

"*There seems to be no room for construction.* The taxes claimed are confessedly due and owing. Of the aggregate tax claimed $450 was assessed against the aggregate value of the personal prop-

> erty owned by the bankrupt and the remainder upon the aggregate value of the realty. Under the Tennessee statute this assessment constituted a first charge or lien upon the fee in said property, regardless of liens or divisions of interest * * * But, *irrespective of the question of a lien,* the taxes constituted a personal debt against the taxpayer which can be enforced by proceedings *in personam.* The bankrupt says that 'all taxes legally due and owing by the bankrupt' shall be paid by the trustee 'in advance of the payment of dividends to creditors.' This does not say or mean that such payment shall be dependent upon the question as to whether they are a secured debt. * * * Congress evidently meant that the sovereign should neither be postponed nor delayed in the collection of taxes, and therefore provided that the trustee should pay all taxes due and owing by the bankrupt in advance of dividends. The bankrupt might have paid all taxes immediately prior to the filing of a petition by or against him. This would not have been a preference. The law means that the trustee shall do what the bankrupt might have done and what good citizenship required him to do."

And in the present case the bankrupt might have paid the franchise taxes and its act would never have been called in question.

And *In re Baker,* 1 Am. Bank. Rep., 526, 529, it is said:

> "It is the opinion of the court that *even if the city had no statutory lien* on the property of the bankrupt the claim for taxes has priority and should be paid out of the proceeds of the property which is under the state law subjected to the payment of the debts of the bankrupt."

Counsel take the tack that it is the tax of *the* state and not the taxes *of any state or of all states that* are

entitled to priority. To support this last proposition they rely upon a supposed legislative intention to restrict the preference to a particular state.

This so-called intention counsel endeavor to ascertain by reference to the action of the Senate on the various bills relating to bankruptcy, introduced previous to the passage of the present law. Let us follow counsel in their reasoning. The original bill in the Senate was known as the "Torrey Bill." This bill gave priority to *debts* due a state, to the extent only that such *debts* constituted a lien on the property of the bankrupt. In place of this bill the Senate substituted what was known as the "Nelson Bill," which gave priority to "taxes due *any* state or territory or the District of Columbia." Congress then adjourned, and at its next session, passed the present law known as the "Henderson Bill," which was reported by the House. From these proceedings counsel draw the conclusion that Congress did not intend to give preference to the taxes of all the states, but only of a particular state, because of the fact that they did not pass the bill which expressly gave preference to the taxes of *any* state. If there were no other provisions in the Bankruptcy Law than those relating to the priority of taxes, there might be a semblance of logic in the contention. The law, however, contains seventy sections relating to as many different subjects. Counsel ask this court to hold because the Senate did not pass the Torrey Bill, which gave preference only to *debts* that were a lien, or because the Senate failed to pass the Nelson Bill, which gave preference to the taxes of *any* state, that Congress intended that preference should not be

given to the taxes of every state. Is there anything to show that the Torrey or the Nelson bills did not become law on account of the provisions referred to? Does it anywhere appear that the differences in phraseology in the various bills were even the subject of discussion or that the bill which became a law, became so because of a supposed restriction on tax priority? If the Henderson bill passed solely because it restricted tax priority to a single state, it would have been much easier to strike out the word "any" before the word "state" in the Nelson Bill and pass that bill as thus amended, or to substitute Section 64a of the present law in place of Section 65a in the Torrey Bill. Again, the action *of the Senate* is not the action of Congress. The views of the Senate, if those views were evidenced by the rejection of the Torrey and Nelson bills, may not have been the views of the House, or of the President. Yet counsel contend that by the adoption of the Henderson Bill, Congress recorded an explicit refusal to give preference to the taxes of *any* state. A reading of the debates on all of these bills bears out the statement that the matter here under consideration was not referred to or brought in question.

Whatever construction is placed on the present law must be drawn from the language of the act. To hold because certain bills, not passed, and introduced only in the *Senate,* contain provisions different to those in the law as passed, that *Congress* has expressed its intention in relation to the subject matter of such differences, would be judicial legislation.

But not only on principle but under the authorities

it is clear that the action of the Senate upon these various bills is entitled to no consideration whatever.

In *Aldridge* v. *Williams*, 3 How., pp. 9, 24, Taney, C. J., laid down the rule as follows:

> "In expounding this law, the judgment of the court cannot, in any degree, be influenced by the construction placed upon it by individual members of Congress in the debate which took place on its passage, nor by the motives or reasons assigned by them for supporting or opposing amendments that were offered. The law as it passed is the will of the majority of both houses, and the only mode in which the will is spoken is in the act itself; and we must gather their intention from the language there used, comparing it, when any ambiguity exists, with the laws upon the same subject, and looking, if necessary, to the public history of the times in which it was passed."

In *U. S.* v. *Trans-Missouri Freight Assn.*, 166 U. S., 290, 318, it was sought to show by the debates in Congress that railroads were not included in the Sherman Act. The history of the bill and the various amendments offered were shown. This court said:

> "Looking simply at the history of the bill from the time it was introduced in the Senate until it was finally passed, it would be impossible to say what were the views of a majority of the members of each house in relation to the meaning of the act. It cannot be said that a majority of both houses did not agree with Senator Hoar in his views as to the construction to be given to the act as it passed the Senate. All that can be determined from the debates and reports is that various members had various views, and we are left to determine the meaning of this act, as we determine the meaning of other acts, from the language used therein. There is, too, a general acquiescence in the doctrine that debates in Con-

> gress are not appropriate sources of information from which to discover the meaning of the language of a statute passed by that body." (Citing authorities.)

In *Mitchell* v. *Great, etc., Mfg. Co.*, Fed Cas., 9, 662; 2 Story, 648, the rule was similarly laid down by Mr. Justice Story.

And a strong case to the effect that the rejection of a proposed amendment cannot be considered is *State* v. *Insurance Co.*, 66 Ark., 466; 45 L. R. A., 348; 51 S. W., 633.

The case of *Blake* v. *National Bank*, 3 Wall., 307, cited by counsel as holding a *contra* doctrine, was one where the journals of Congress were used to show that a badly expressed and apparently contradictory enactment, was occasioned by the introduction of an amendment without due reference to the language in the original bill. The case is no authority for their present contention.

The argument of appellee is also inconsistent. On the one hand it is insisted that tax priority is given to but a *single* state while on the other hand it is insisted with equal earnestness that preference is given to the taxes of *all* states in which the bankrupt had property.

In conclusion it is contended that the claim should be denied priority for the reason that in the absence of bankruptcy proceedings the state of New Jersey could not have enforced its claim in any other manner than as an ordinary creditor, inasmuch as the bankrupt had no property in New Jersey. This is an argument which should more properly be ad-

dressed to Congress. Of course if Section 64a was not in force the state of New Jersey would not be here seeking priority. And in this connection counsel state that the appellant is attempting to absorb "almost the entire fund" leaving creditors of more than $200,000 *absolutely unpaid.* There is no justification for any such statement in the record and outside of the record, the statement is inaccurate, as the estate has already paid a dividend. Such a suggestion was advanced under similar circumstances in the case of *In re Tilden,* 91 Fed., 500, but in a lengthy opinion the court overruled the contention.

There the trustee was required to pay taxes which were assessed on, and were a lien against exempt property, although the trustee never had possession thereof, and it was argued that

> "The amount in the hands of the trustee, if applied to pay these taxes on this exempt homestead, will be substantially exhausted leaving barely sufficient to pay expenses of administration of the estate."

But the court replied that "the statute requires such payment."

And *in re Stalker,* 123 Fed., 961 (Dist. Ct., W. D. New York), the court, in allowing priority as a tax to an assessment levied for local improvements, said:

> "The significance of Section 64a as applied to a municipality, is that a claim for taxes is paramount to all other claims, because of the pecuniary needs and requirements of the municipality, and so as to relieve the general taxpayers from the payment of an unfair proportion of taxes. Some seemingly unjust features may be presented by the application of the stringent provisions of the bankrupt act referred to, *but, as the law is plain and*

> *singularly free from ambiguity, it is obvious that Congress intended that the statute should be strictly construed and applied,* unless the facts disclose unjust or prejudicial results."

THE 1903 TAXES.

In reference to the 1903 taxes it is contended that they are not a proper claim because they are not due and payable until after the date of the adjudication. We replied to this contention on pp. 44-48 of our opening brief. As pointed out in our brief and in the opinion of the Court of Appeals, the 1903 taxes were a *fixed liability* on January 1st, 1903. The petition in bankruptcy was filed on April 23, 1903. The bankrupt thereafter made a return on May 2, 1903, showing the amount of its capital stock issued and outstanding on January 1, 1903. (Rec., 27.) The amount of the tax could not be thereafter changed by reducing or increasing the amount of the capital stock, or by the dissolution of the company.

The fact that the obligation does not mature until July 1st, is entirely immaterial as the Court of Appeals held in the present case.

In re Flynn, 134 Fed., 145, Judge Lowell said:

> "Under the statutes of Massachusetts, I think that the tax here in question became 'legally due and owing' May 1, 1899, *though not payable until after the adjudication.*"

And *in re Prince & Walter,* 131 Fed., 546 (Dist. Ct., M. D. Penn.), while an estate was in the hands of the trustee, it was assessed for taxes. The court referred to the provisions of the Bankruptcy Act and said:

> "Taxes, as a class, are thus put at the head of

everything—even above the expense of preserving the estate, or the cost of administering it. Brandenburg, Sec. 1008; Collier (4th Ed.), 459. This is explicit and decisive, and, as the taxes of 1901 are unquestionably within the provisions of the act, they must be paid.

The taxes of 1902 stand somewhat differently. They were not due and owing by the bankrupts at the time of their bankruptcy but have accrued since the proceedings were instituted, and do not, therefore, fall within the strict letter of the law. But the bankruptcy act does not withdraw the estates of bankrupts from the reach of the taxing powers, and they are subject, in consequence, to the payment of taxes imposed while they are in the hands of trustees, the same as if they were not."

(Citing cases.)

"Even though accruing after bankruptcy, they must be regarded as within the meaning of the statute, and entitled to priority, the same as those which antedated it. They are equally important to the municipalities to which they are due, whenever assessed, and the obligation of the property to respond is logically no different or greater at the one time than at the other. The same reasons existing in both cases, it must be assumed that no distinction was intended to be made between them. The taxes of 1902 must consequently be paid, the same as those of 1901, out of the personal fund, in preference to every other charge; and this includes the penalties for non-payment which are a constituent part of them."

Counsel cite a number of cases to the effect that a debt must be due and owing in order to be provable as such. With one exception the cases cited are all cases of claims for rent *accruing after* the adjudication in bankruptcy. The one exception is the case of

in re Aultman, Miller & Co., 12 Am. Bank. Rep., p. 12 (decided by a referee), where a claim was filed for an excise tax due the State of Ohio. It was there said:

> "The Bankruptcy Act does not make any distinction as to the character of the tax which is imposed. A license fee or franchise tax imposed by the state is recognized by the Federal courts as a tax, and as such would be entitled to priority of payment in bankruptcy proceedings. *Western Union Telegraph Co.* v. *Mass.*, 125 U. S., 530, 31 L. Ed., 790."

The only objection made to the tax was that it was not due at the time of the adjudication. The referee said:

> "There is nothing in the Bankrupt Act to warrant any inference that such a preferred claim is entitled to any greater privilege beyond the priority of payment, than other claims."

Does not a comparison of Sections 63 and 64 of the Bankruptcy Act "warrant any inference" that Congress intended to exempt taxes from the provisions of Section 63 governing provable debts, and allow them priority irrespective of when they were due? Otherwise, why direct the court "to order the trustee to pay?"

The referee continued:

> "It may be claimed that property in the hands of a receiver or trustee is subject to taxes to the state, county or municipality, the same as though in the custody of an individual, but in this case the excise tax is not a charge against property, and is expressly so held in the *Southern Gum Co.* v. *Laylin*. The tax in question is one imposed upon a corporation, not on account of its property, but on account of its right to exist and do

business as a person under the protection of the laws of the State of Ohio. Whether the corporation exists or not after the petition in bankruptcy is filed is not a question for discussion here. If the corporation is in existence, then under the act in question it is subject to this franchise tax, and like an individual who has gone into bankruptcy, would be subject to after-incurred indebtedness, and cannot have the same imposed upon its trustee in bankruptcy."

The referee in that case seems to have misconceived the scope of Section 64 just as the referee in the present case did. The preference allowed by that section is not limited to property taxes. The referee in the case cited conceded that accruing *property* taxes are a lien irrespective of the time they become due, and *in re Prince & Walter,* 131 Fed., 546, *supra,* it was expressly so held. In what respect does the present tax differ, under the Bankruptcy Act, from a *property* tax? Upon what theory can a discrimination between them be justified? If one is entitled to priority so is the other. The concluding language of the referee in the Aultman, Miller & Co. case, which is quoted in the brief of opposing counsel (pp. 75-76), may possibly present a reason why the law should be amended. It is the argument *ab inconvenienti.* Every one of the reasons advanced by the referee against the allowance of the preference applies with equal force to a strictly *property* tax which the referee practically conceded should be allowed. If a property tax should be allowed preference irrespective of time, then the present tax is also entitled to preference, as there is no ground in the law for any distinction.

But irrespective of these considerations, it will be found upon an examination of the Ohio law imposing the franchise tax, which was before the referee in the above case, that the tax was not due or owing, nor the liability fixed or determinable previous to the bankruptcy proceedings, as it is in the present case. In the Ohio case the taxes were levied for the year 1903. The petition in bankruptcy was filed on April 6, 1903, and the adjudication was had on April 28, 1903.

The referee in his opinion says:

> "The fee or excise tax * * * is evidently not made a charge for *past* enjoyment but * * * for the year ensuing *after* the filing of the annual report in May."

The law under which the tax was levied (Vol. 95, Laws of Ohio, p. 124, *et seq.*) provides that annually, during the month of *May*, every corporation shall report among other things the following:

> "5. The amount of authorized capital stock and the par value of each share.
>
> 6. The amount of capital stock subscribed, the amount of capital stock issued and outstanding, and the amount of capital stock paid up."

And that:

> "*Upon the filing of such report*, the secretary of state shall charge and collect from such corporation a fee of one-tenth of one per cent. upon the subscribed or issued and outstanding capital stock of said corporation, and to be not less than ten dollars in any case."

It is thus apparent that in the Ohio case the tax was not due or owing or the liability fixed until the month *after* the adjudication. In the present case

the tax was fixed and determined at least four months *preceding* the bankruptcy proceedings.

It is insisted however if the claim for the 1903 taxes is allowed, that no estate in bankruptcy can ever be closed as long as money remains in the treasury which can be applied to the payment of taxes. In the present case it is unnecessary to decide whether there is any time limit within which claims for taxes can be presented, inasmuch as no claim has been filed for the 1904 and 1905 taxes. Counsel say, however, that there is no difference between claiming a franchise tax for 1903 in the case at bar and in claiming one for 1904 and 1905. This position cannot be sustained for the reason that the liability for the 1903 taxes was fixed and determined on January 1, 1903, *previous* to the adjudication, while that would not be true with respect to the taxes for 1904 and 1905.

In this connection it is suggested in the opinion of referee Doyle, *in re Aultman, Miller & Co., supra,* that the franchise does not become an asset in the hands of the trustee, and therefore he should not be taxed on account of it. The question was put by Mr. Justice White on the oral argument, as to whether the franchise was an asset. While the franchise may or may not be an asset under the law of Ohio which was before the referee in the above case, it is an asset under the New Jersey law.

Chapter 127, Session Laws of New Jersey, 1897, p. 229 provides (Sec. 1):

> "Whenever the property and franchises of any corporation created by or under any law or laws of this state, except steam-railroad, canal, turnpike or plank-road companies, shall be sold and

conveyed under or by virtue of any decree or decrees of the court of chancery of this state, or of the Circuit Court of the United States in and for the district of New Jersey, sitting in equity, and an execution or executions issued thereon, to satisfy any mortgage debt or debts, judgment or judgments, or other incumbrance or incumbrances thereon, such sale and conveyance, duly made and executed, shall vest in the purchaser or purchasers thereof all the right, title, interest, property possession, claim and demand, in law and equity, of the parties to the suit or suits, action or actions, in which such decree or decrees was or were made, of, in and to the said property so sold with its appurtenances; *and also of, in and to the corporate rights, liberties, privileges and franchises of the said corporation,* but subject to all the conditions, limitations, restrictions and penalties of the said corporation of and concerning the same; and such purchaser or purchasers, and his or their associates not less than three in number, shall thereupon become a new body politic and corporate in fact and in law, by such name as said persons shall select, and shall be deemed and considered the stockholders of the capital stock of such new body politic and corporate, in the ratio and according to the amount of the purchase money by them respectively contributed; and shall be entitled to all the rights, liberties, privileges and franchises, and be subject to all conditions, limitations, restrictions and penalties of and concerning the said corporation whose property and franchises shall have been so sold and conveyed, which were contained in the act or acts creating, or under which the aforesaid corporation was created, and the supplements thereto, so far as the same was or were in force and unrepealed at the time of such sale and conveyance."

Under this law it is clear that in New Jersey the cor-

porate franchise is an asset which the court can sell and dispose of the same as any other property, and it is therefore of value in the hands of the receiver or trustee for at least the amount that the purchaser of the corporate property would be obliged to pay for the issuance of a new charter for the like amount of authorized capital stock. Such a franchise comes within the purview of Section 70a (clause 5) of the Bankruptcy Act which provides that the trustee shall be vested with the title to all property "which might have been levied upon and sold under judicial process."

But even if we assume that the corporate franchise is of no value whatever to the bankrupt estate, and even though the trustee never gets the title or possession of it, nevertheless the franchise taxes are clearly entitled to priority under the express words of Section 64a.

In the case of *In re Tilden,* 91 Fed., 500 (Dist. Ct. S. D. Iowa), the question is squarely decided. There the trustee was required to pay certain taxes assessed and due on the homestead of the bankrupt, and constituting a lien thereon at the time of the adjudication, although such homestead had been set apart to the bankrupt as exempt and the trustee never had title thereto. The court said (pp. 501-2):

> "The contention of the bankrupt is that taxes duly standing on the proper tax books against the exempt homestead are, within the meaning of this section, 'taxes legally due and owing by the bankrupt.' The phraseology of the statute apparently favors this contention,—'all taxes legally due and owing,' etc. There is no express exclusion of taxes against exempt property. The trus-

tee is to pay 'all taxes legally due and owing by the bankrupt.' The creditors, however, plead what they term the 'injustice' of such a construction. The exempt property may have a large amount of taxes standing against it. *The estate receives no benefit whatever from the exempt property.* Where, as here, there is no question as to the property being exempt the trustee, if he can in any wise be properly said to take such property, under the adjudication of bankruptcy, takes it only for the purpose of at once passing it out as exempt property. So that, if received by him affected by the lien for taxes, why should the trustee pass it back in a better condition than he received it? Wherein is his duty to lessen the general estate in his hands, by applying a part of same to the removal of said tax liens, and thus lessening the amount otherwise distributable to the general creditors? If a mechanic's lien, or other like lien, existed against said exempt property, the general assets of the estate would not ordinarily be thus lessened to effect the removal of such lien. And the creditors call attention to this case as plainly showing the unjust result, as they term it, of the opposite construction of the statute. *The amount in the hands of the trustee, if applied to pay these taxes on this exempt homestead will be substantially exhausted, leaving barely sufficient to pay expenses of administration of the estate;* and there seems much force in the argument. On the other hand, the bankrupt calls attention to the letter of the law,—'all taxes legally due and owing by the bankrupt.'—without any qualifying terms. And he properly insists that the burden is on the creditors to show why the statute does not intend what its terms plainly state. He also insists that this paragraph is a manifest recognition by congress of the proposition that, whether any other creditor be paid or not, the government—national, state or municipal—is to have its taxes out of the estate. Again, the bankrupt might have paid

these taxes at any time before filing his petition in bankruptcy. If, while on his way to the clerk's office to file such petition, he had stopped at the taxpaying office, and there paid these taxes, and thereby reduced the general assets (actually turned into the estate) by the amount of those taxes, no one could have justly complained. He very effectively inquires why is the general creditor now injured by payment of these taxes out of the estate, if their payment, as above suggested, could not have been complained of by him?"

In *City of Chattanooga* v. *Hill,* 139 Fed., 600 (C. C. A. 6th Cir.), the Court cited *In re Tilden,* 91 Fed., 501, with approval, saying:

> "That the bankrupt's creditors were not benefited by the bankrupt's homestead was held not enough to raise a doubt upon the plain meaning of so ambiguous a law."

And in the case of *In re Baker,* 1 Am. Bank. Rep., 526, a similar claim for taxes against *exempt* property was filed.

The court allowed the claim and said:

> "It is the opinion of the court that even if the city had no statutory lien on the property of the bankrupt the claim for taxes has priority and should be paid out of the proceeds of the property which is under the State law subjected to the payment of the debts of the bankrupt."

It is urged that appellant's entire claim should be allowed as a preferred claim.

Respectfully submitted,

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